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No. 76-623

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

**BANKERS LIFE & CASUALTY COMPANY, PETITIONER**

v.

**MARTIN R. HOFFMANN, SECRETARY OF THE ARMY, ET AL.**

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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**OPINIONS BELOW**

The district court issued no opinion. The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 530 F. 2d 625.

**JURISDICTION**

The judgment of the court of appeals was entered on April 21, 1976. A petition for rehearing was denied by the court of appeals on August 4, 1976. The petition for a writ of certiorari was filed on November 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the provisions of 5 U.S.C. 558(c) indefinitely extend the life of a permit to fill submerged lands,

(1)

although the application for renewal of the permit is deemed incomplete by the Corps of Engineers.

2. Whether the non-renewal of the permit to fill submerged lands is a "withdrawal, suspension, revocation, or annulment of a license" within the meaning of 5 U.S.C. 558(c)(2).

#### STATEMENT

In 1957, the Corps of Engineers granted Bankers Life and Casualty Company (Bankers) a permit to fill approximately 194 acres of submerged lands in Lake Worth, Florida, within the Village of North Palm Beach. The permit carried the following statement on its face:

That this instrument does not give any property rights either in real estate or material, or any exclusive privileges.

It also stated:

If the structure or work herein authorized is not completed on or before the 31st day of December, 1960, this permit if not previously revoked or specifically extended, shall cease and be null and void.

At Banker's request the Corps extended this permit to December 31, 1963. The extension also contained the statement that if work authorized by the permit was not completed during the period of extension the permit would become null and void (Pet. App. 3a).

Shortly before the permit expired in December 1963, the Trustees of the Internal Improvement Trust Fund (Trustees), the agency of the State of Florida having jurisdiction over this matter, wrote the Corps of Engineers requesting that any extension of Banker's permit be deferred pending Banker's receipt of a local fill permit from the Village in accordance with state law (Pet. App. 3a). The

Corps thereupon informed Bankers, by a letter dated December 27, 1963 (Pet. App. 3a), that it would not be possible to grant an immediate extension at that time because of Corps' policy when there was local objection.

During the next five years no further action was taken by Bankers in response to the Corps' letter, apparently because of attempted settlements of disputes between Bankers, the State of Florida, and local governmental agencies, concerning title to the submerged lands sought to be filled (Pet. App. 3a-4a). On December 6, 1968, and March 17, 1969, Bankers corresponded with the Village in an effort to obtain a local fill permit. In June 1969, the Village indicated that a permit would be granted but rescinded this action on July 10, 1969. In a letter of July 18, 1969, the Corps informed Bankers that it would still be necessary to obtain the written approval of the Trustees "before further action can be taken on your application" (Pet. App. 4a).

On March 20, 1970, Bankers brought suit in the United States District Court for the Southern District of Florida, against the Corps of Engineers and state and municipal defendants, to compel the issuance of the necessary permits. The district court held in favor of Bankers, but the court of appeals reversed, *Bankers Life & Cas. Co. v. Village of No. Palm B., Fla.*, 469 F. 2d 994 (C.A. 5), certiorari denied, 411 U.S. 916 (*Bankers I*). The court of appeals noted that, over the time period since the Trustees first voiced their opposition to the project, the Corps had acquired new obligations to consider various environmental factors, all of which applied to Bankers. Because Bankers had not filed a formal application with the Corps, the court held that "[t]he matter was not ripe for court action because the official of the government, who was empowered to act, had not been given an opportunity to perform the duties imposed on him by the federal statutes." 469 F. 2d at 999. The court also held that the granting or denial of the permit was not a purely



ministerial act, and returned certain state law issues to the district court with a suggestion that the issues be certified to the state courts (Pet. App. 6a).<sup>1</sup>

Bankers brought this action on March 8, 1973, only against the federal defendants, to compel the Corps to proceed with formal consideration of Bankers' 1963 application, although Bankers had not supplied any of the authorizations required from state and local authorities. The defendants' motion to dismiss the complaint was granted without opinion in an order entered July 13, 1974 (Pet. App. 11a).

The court of appeals affirmed, holding that the case was ripe for judicial review (Pet. App. 12a-17a) but rejecting Bankers' claims on the merits (Pet. App. 18a-23a).

Regarding the merits, the court held that Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), did not keep Bankers' 1960 permit alive; rather the purpose of the statute was simply to ensure that rights conferred by a license for a limited term should not be lost because an agency had insufficient time to decide an application for renewal before expiration of the existing license (Pet. App. 20a-21a). As possible alternative bases for its decision, the court stated that "the permit was never specifically extended; thus, by its own terms, it became null and void upon the date of expiration" (Pet. App. 19a), and that "filling land is not an activity of a continuing nature," within the meaning of 5 U.S.C. 558(c) (Pet. App. 21a, n. 13).

The court also held that the provisions of 5 U.S.C. 558(c)(1) and (2), were inapplicable to this case. Those provisions require notice and an opportunity to show

<sup>1</sup>These state law issues concern title to land to be filled. They are discussed at Pet. App. 6a-8a.

compliance "with all lawful requirements" in cases of "withdrawal, suspension, revocation, or annulment of a license \* \* \* ." The court rejected Bankers' argument that in the present case there was a "withdrawal" of Bankers' permit, holding that such language was only intended to cover sanctions imposed by an agency.

#### ARGUMENT

The decision of the court of appeals, on whose opinion (Pet. App. 1a-24a) we principally rely, is correct and presents no question warranting review by this Court.

1. The decision below correctly recognizes that the last sentence of 5 U.S.C. 558(c) was intended only to preserve licensing rights of persons engaged in "an activity of a continuing nature," where they have made "timely and sufficient application \* \* \* in accordance with agency rules," and where the license would otherwise expire because of the agency's inability timely to decide the application for renewal. *County of Sullivan v. Civil Aeronautics Board*, 436 F. 2d 1096, 1099 (C.A. 2). See also *Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R.R.*, 353 U.S. 436, 444-445 (Burton, J., dissenting). Although Bankers suggests that Section 558(c) should nonetheless govern this case because the Corps has allegedly denied Bankers' application for renewal through years of inaction, the Corps of Engineers has considered Bankers' application for renewal to be insufficient from the beginning because it did not have the approval of state authorities (Pet. App. 20a). Subsequently, the application has become even more insufficient as the Corps assumed environmental responsibilities mandated by the National Environmental Policy Act of 1970 with regard to its dredge and fill permits.<sup>2</sup>

<sup>2</sup>The court of appeals observed in *Bankers I* (469 F. 2d at 998):

Bankers is not in a position to complain if, during the period of its own lack of effort to force the matter to an issue, the

Thus, as the court of appeals concluded, 5 U.S.C. 558(c), designed to fill in licensing gaps for continuing activities such as radio and television broadcasting, should be not interpreted to keep alive a dredge and fill permit issued in 1960 merely because Bankers had filed an insufficient application for renewal.

Bankers also suggests (Pet. 15-16) that the rule of the court of appeals is unworkable. In our view the decision is plainly workable and correct on the facts of this case, and it will pose no problems in the renewal of licenses in other areas. Should the present opinion create any significant difficulties with 5 U.S.C. 558(c), however, conflicts among the courts of appeals or other circumstances warranting this Court's attention presumably will arise. In the absence of such circumstances, there is no reason for this Court to review this case.

3. Bankers further argues (Pet. 17-18) that 5 U.S.C. 558(c)(2) entitles it to notice and opportunity to show that it is entitled to renewal of its lapsed 1960 permit. Again Bankers does not demonstrate any conflict among the circuits or any reason why this Court should review the matter. In any event, we believe the court of appeals was correct in holding that 5 U.S.C. 558(c)(2), which governs "withdrawal, suspension, revocation, or annulment of a license," does not include failure to renew the permit, which by its terms expired in December 1963 unless all work was completed by that date, but is only addressed to the imposition of sanctions by an agency (Pet. App. 21a-22a).

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requirements on the Corps of Engineers for the issuance of a permit, although still couched in terms of "navigation," included by the time the law suit was filed, much more stringent requirements.

# CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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